TAIB AWANG

v.

MOHAMAD ABDULLAH & ORS.

HIGH COURT MALAYA, KUALA TERENGGANU
EUSOFF CHIN J
[CIVIL SUIT NO. 94 OF 1982]
23 AUGUST 1983

TORT: *Malicious prosecution - Conviction.*

CIVIL PROCEDURE: *Appeal - Application to strike out - No reasonable cause of action - Competence of High Court.*

The plaintiff claimed damages against the defendants on the ground that he had been wrongfully and maliciously prosecuted in the Kadi's Court for an offence under s. 149 Administration of Islamic Law Enactment, Trengganu 1955 (''the Enactment''). The defendants applied for the action to be struck out under O. 18 rr. 19(1)(a) and (b) of the Rules of the High Court 1980.

Held:

[1] The plaintiff's statement of claim did not disclose any reasonable cause of action against the three defendants. In an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceedings complained of terminated in his favour. The statement of claim did not disclose that the prosecution of the plaintiff ended in his favour. In fact it was admitted that the prosecution had ended in plaintiff's conviction and sentence and that the conviction was still under appeal. (*Everett v. Ribbands & Another* [1952] 2 QB 198).

[2] It was premature for the plaintiff to bring the action since the criminal proceedings against him had not been finally determined by the Syariah Court in the plaintiff's favour. It was not right for the High Court to consider and make an order on the validity of the prosecution and conviction or on any of the other points submitted by the plaintiff. To do so would mean turning the High Court into an appeal Court when s. 26 of the Enactment provides that an appeal from the decision of a Kadi's Court lies to the Syariah Appeal Court. Section 25(4) of the Enactment did not apply.

[Application to strike out allowed.]

Cases referred to:
Basebe v. Matthews and Wife [1867] LR 2 CP 684
Bynoe v. Bank of England [1902] 1 KB 467
Everett v. Ribbands and Another [1952] 2 QB 198

Legislation referred to:
Administration of Islamic Law Enactment 1955 (Trengganu) ss. 22, 25(2), (4), 26, 39, 149
Rules of High Court 1980, O. 18 rr. 19(1)(a), (b)

For the plaintiff - Wan Abd. Muttalib bin Embong; M/s. Wan Abd. Muttalib & Co.
For the defendants - Abdul Aziz bin Mohamad; State Legal Adviser

JUDGMENT

Eusoff Chin J:

The plaintiff claims damages against the three defendants on the grounds that he had been wrongfully and maliciously prosecuted in the Kadi's Court for an offence under s. 149, Administration of Islamic Law Enactment Trengganu, 1955 (hereinafter referred to as the Enactment). In the Kadi's Court, the plaintiff was charged *vide* K.T. Kes Jenayah No.108/81 as follows:

> Bahawa kamu Taib bin Awang K/P No. 1713960 pada 31 July 1981 antara jam 12.40 hingga 1.15 petang telah mengeji Pejabat Hal Ehwal Ugama Trengganu dengan bertindak sebagai Imam mendirikan Sembahyang Jumaat di Surau Pintu Gerbang Chendering, Kuala Trengganu sedangkan pada 2 May 1981 Pejabat Hal Ehwal Ugama Trengganu telah mengeluarkan satu surat sibaran Bil. (10) dalam PU. Tr. 15/1/133, telah disibarkan kepada penduduk-penduduk Chendering dan satu salinan telah ditampalkan di Surau tersebut menegah siapa-siapa mendirikan Sembahyang Jumaat di Surau tersebut. Oleh yang demikian kamu dituduh telah melakukan satu kesalahan di bawah fasal 149 Undang-Undang Pentadbiran Hukum Syarak Bil. 4/55 Trengganu dan boleh dihukum di bawah fasal yang sama.

The statement of claim, however, does not disclose whether or not the plaintiff was found guilty of the charge and if so what sentence was passed on him, or whether he was acquitted by the Kadi's Court. But in the course of argument, the plaintiff's Counsel admitted that the plaintiff was found guilty and was sentenced to two weeks' imprisonment, and that the case in the Kadi's Court was still under appeal.

The first defendant, Mohamad bin Abdullah, is an investigating officer, and the second defendant is a prosecutor, both of the Religious Affairs Department Trengganu. The third defendant is the State Commissioner of that Department.

It is claimed by the plaintiff that the third, defendant had issued a circular on 2 May 1981 prohibiting the performance of Friday prayer at Surau Chendering Pintu Gerbang. The plaintiff claims that Surau Chendering Pintu Gerbang is not the mosque where the plaintiff was the imam (leader) at the Friday prayer on 31 July 1981, as this mosque was gazetted as a mosque *vide* PTG. (78) dlm. CLM. 166/53. On that day, 31 July 1981, the first defendant and his companions were at the mosque in the congregation performing the Friday prayer led by the plaintiff, and therefore had committed the same offence but were not charged in the Kadi's Court. On the next day 1 August 1981, first defendant lodged a report to the Syariah Court, Kuala Trengganu, to the effect that the plaintiff had led a Friday prayer at Surau Pintu Gerbang Chendering, which resulted in the prosecution of the plaintiff.

Plaintiff, therefore, alleges that the first defendant had lodged a false report against him, and acting on that report, the second defendant had wrongfully and maliciously prosecuted the plaintiff. As against the third defendant, the plaintiff alleges that the third defendant had no authority to issue the circular, and to prohibit the plaintiff from performing Friday prayer at the said mosque since the place was the authorised and gazetted mosque, and, therefore the mosque was recognised by the Sultan. Plaintiff claims that the third defendant's circular had made it unlawful for Friday prayer to be held at that mosque. As the result of the defendant's malicious and wrongful prosecution of the plaintiff, the plaintiff has suffered damages and injury to his reputation and standing, and has been put to public contempt.

The plaintiff prays for the following orders:

(i) A declaration that the Administration of Islamic Law Enactment, State of Trengganu No. 4 of 1955 be declared void and of no effect. (Withdrawn by plaintiff's Counsel in Court).

(ii) A declaration that the 3rd defendant has no right to give a name "Surau Pintu Gerbang Chendering" to Masjid Besar Chendering which was lawfully gazetted as such.

(iii) A declaration that the building standing on Lot 261 KSB 549 Mukim Chendering is a lawful mosque and used for the purpose it was gazetted.

(iv) A declaration that the prosecution of the plaintiff was wrong in law.

(v) The defendants pay damages to the plaintiff.

(vi) Costs

(vii) Any other order the Court shall deem fit.

The State Legal Adviser, for the three defendants, filed summons-in-chambers seeking an order that the plaintiff's action be struck out under O. 18 r. 19(1)(a) and (b), of the Rules of the High Court 1980.

In the course of arguments, the plaintiff's Counsel withdrew paragraph 16 and prayer number (i) in the plaintiff's statement of claim. He also confirmed that the plaintiff was convicted by the Kadi's Court, and sentenced to two weeks' imprisonment and that the sentence is still under appeal.

The State Legal Adviser said in arguments that the first defendant only lodged a report, under s. 39 of the Enactment which states:

> 39 (1)An information with a view to prosecution shall be made in writing or orally to the presiding officer of the Court. If made orally, it shall be reduced to writing by him. In either event, he shall require the informant to affirm to the truth of such information.
>
> (2)The Court may refuse to take any such action on such information if not satisfied that there is reason to believe that an offence had been committed.

The second defendant was the person who had conducted the prosecution which resulted in the plaintiff's conviction.

The State Legal Adviser contended that since the prosecution of the plaintiff ended in his conviction, the plaintiff had no cause of action for malicious prosecution against the defendants.

Counsel for the plaintiff had submitted at length alleging that the Mufti's circular did not say which of the mosques at Kampong Chendering was the lawful mosque. He contended that the lawful mosque was the one in which the plaintiff had led the Friday prayer. The Majlis Ugama Islam had made a mistake by recognising the wrong mosque. There was malice on the part of the defendants as out of about 250 people performing prayer at that mosque with the plaintiff, only the plaintiff was prosecuted. He also alleged that the Kadi who tried the plaintiff, did not understand the English Language and had to depend on the translated version of the Enactment; and that the translation was wrong and faulty.

Going through the allegations in the statement of claim of the plaintiff, I find that the plaintiff is claiming damages for having been maliciously prosecuted by the defendants, (paragraph 9 and 14 of the statement of claim). The statement of claim does not, however, disclose

whether the prosecution resulted in the plaintiff's acquittal or conviction. But Counsels for both plaintiff and defendants agreed in Court that the prosecution resulted in the plaintiff's conviction and that the plaintiff was sentenced to two weeks' imprisonment by the Kadi's Court; and further that the conviction was still under appeal when this application came up for hearing before me.

In an action for malicious prosecution, the plaintiff must prove that:

(a) the defendants prosecuted him;
(b) the prosecution ended in the plaintiff's favour;
(c) that the prosecution lacked reasonable and probable cause; and
(d) that the defendant acted maliciously.

The statement of claim does not disclose that the prosecution of plaintiff ended in his favour. Indeed the plaintiff's Counsel admitted that it ended in plaintiff's conviction and sentence. His conviction is still under appeal.

In *Everett v. Ribbands and Another* [1952] 2 QB 198, it was held that in an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceeding complained of terminated in his favour. Somervell L.J. at page 202, quoted a passage of the judgment of Crompton J in *Bynoe v. Bank of England* [1902] 1 KB 467 which was confirmed by the Court of Appeal which is:

> There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage ... But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause.

In *Basebe v. Matthews and Wife* [1867] LR 2 CP 684, Byles, J said at page 687:

> I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg v. Blake* (Hardr. 194), where Hale, C.J., says that, 'if such an action should be allowed,' - that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper Court, the judgment would be blowed off by a side-wind'.

In that same case, Montague Smith, J said at page 688:

> But, in such an action, it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another Court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause. The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against

> the conviction. If we yielded to his argument, we should be constituting ourselves a Court of Appeal in a matter in which the legislature had thought fit to declare that there shall be no appeal. It was intended that the decision of the Magistrate in a case of this sort should be final. It cannot be impeached in an action.

Counsel for the plaintiff argued and advanced many grounds why he thought that the plaintiff ought not to have been prosecuted and convicted in the Kadi's Court. I do not think it right for me to consider and make an order whether the prosecution and conviction of the plaintiff was proper and in accordance with law and also the other orders prayed for, because to do so now would mean turning the High Court into an Appeal Court where s. 26 of the Enactment, provides that an appeal from the decision of a Kadi's Court lies to the Syariah Appeal Court.

Counsel for the plaintiff referred me to s. 25 of the Enactment. Section 25(4) of the Enactment states:

> (4) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference of conflict arising between the decision of a Court of the Chief Kadzi or a Kadzi and the decision of a Civil Court acting within its jurisdiction the decision of the Civil Court shall prevail.

I think what subsection (4) of s. 25 of Enactment means is that where the same matter is within the jurisdiction of the Kadi's Court and that of a Civil Court to try, and two conflicting decisions are made, then the decision of this Civil Court shall prevail. The case before me is not one where the matter is triable both by the High Court and the Kadi's Court.

Counsel for plaintiff also submitted that the Kadi did not know English and, therefore, he could not understand the provisions of the Enactment which was written in English. He alleged that the Kadi was administering the law in ignorance, and had to rely on the law as translated to him, or to rely on the unlawful translation (into Malaya) of the English text. At para. 15 of the statement of claim. It is alleged that the Kadi was therefore not competent to hear the plaintiff's case.

I note that under s. 22 of the Enactment, suitable persons may be appointed by the Sultan as Kadis, and that under s. 25 (2) of the Enactment, a Kadi is competent to try a criminal case punishable with imprisonment not exceeding one month. An offence under s. 149 of the Enactment carries a maximum penalty of one month's imprisonment. I think the competency or otherwise of the Kadi to hear the criminal case against the plaintiff, and all the other points raised in the submission by the plaintiff's Counsel are points which properly should be submitted for consideration by the Syariah Appeal Court at the hearing of the plaintiff's appeal there. I am also of the view that since the criminal proceedings against the plaintiff in the Kadi's Court has not been finally determined by the Syariah Appeal Court in the plaintiff's favour it is premature for the plaintiff to bring this action.

I am, therefore, satisfied that the plaintiff's statement of claim discloses no reasonable cause of action against the three defendants, and I order that it be struck out with costs.

Also found at [1984] 1 CLJ 44